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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

FATEMEH SAADATI,

Plaintiff and Respondent,

v.

LONGS DRUG STORES CALIFORNIA,  
INC.,

Defendant and Appellant.

B202005

(Los Angeles County  
Super. Ct. No. BC341932)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Victor E. Chavez, Judge. Affirmed.

Filice Brown Eassa & McLeod, Robert D. Eassa and Delia A. Isvoranu for  
Defendant and Appellant.

Bononi Law Group and Michael J. Bononi for Plaintiff and Respondent.

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Defendant Longs Drug Stores of California, Inc. (Longs) appeals from the judgment following a jury trial and from an order denying its motion for Judgment Notwithstanding the Verdict (JNOV). Longs’s sole contention on appeal is that the verdict was not supported by substantial evidence that plaintiff Fatemeh Saadati was a “qualified individual” with a disability under California employment discrimination law. We affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

We recite the facts according to the usual rules of appeal from denial of JNOV. (*Carter v. CB Richard Ellis, Inc.* (2004) 122 Cal.App.4th 1313, 1320 (*Carter*).)<sup>1</sup> The evidence established that Saadati suffered a knee injury while skiing in the 1970’s. In March 2000, Saadati began working for Longs as a cashier (officially designated as Customer Service Representative). A few weeks later, she was put in charge of the Hallmark Card department. In December 2000, her designated position was changed from Customer Service Representative to Greeting Card Clerk. And in April 2005, pursuant to a directive from Human Resources, store manager Wendell Clark changed it back to Customer Service Representative in connection with a planned company-wide reorganization of employees known as the Customer First Staffing initiative, which eliminated the position of Greeting Card Clerk.

Saadati testified that while employed at Longs, she split her time evenly between working at the cash register and her duties in the Hallmark Card department, which included ordering and putting up the cards, and displaying ads. Clark confirmed that Saadati ran the Hallmark Card department, ordered cards, and stocked the shelves.

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<sup>1</sup> An appeal from denial of JNOV is a challenge to the sufficiency of the evidence to support the jury’s verdict and the trial court’s decision. (*Stubblefield Construction Co. v. City of San Bernardino* (1995) 32 Cal.App.4th 687, 703.) Accordingly, we view the record in the light most advantageous to the plaintiff, resolve all conflicts in her favor, and give her the benefit of all reasonable inferences in support of the original verdict. (*Carter, supra*, 122 Cal.App.4th at p. 1320.)

Saadati used a handheld device to scan barcodes on greeting cards which needed to be ordered, then connected the handheld device to a computer which automatically reordered the items.

Because of her knee injury, Saadati suffered pain after six hours of standing. In 2003, Saadati obtained approval from a previous store manager to work 30 to 35 hours a week because of the pain in her knee. After Clark became manager in 2004, Saadati's hours were increased to 40 hours per week. When Saadati told Clark that her knee problems prevented her from working 40 hours per week, he asked for a doctor's note. In April 2004, Saadati obtained from her doctor a written restriction to "no more than six hours [of] standing at a time. She should be able to sit during that six hours if necessary for five to ten minutes." Saadati's doctor faxed the note to Clark, and Saadati's 30- to 35-hour per week schedule resumed.

During the course of 2004 and 2005, Saadati asked Clark for promotions and transfers to various full-time positions at Longs, including Cosmetics Clerk, Bookkeeper, Pharmacy Clerk, Photo Lab Clerk, File Maintenance Clerk, and Stocking Clerk. Clark offered to cross-train Saadati for these positions while she continued as Customer Service Representative, but Saadati declined. Longs denied Saadati's transfer requests. Saadati testified that Clark told her that the letter from her doctor was limiting her ability to get a promotion.

In March 2005, Longs implemented the Customer First Staffing initiative pursuant to which full-time employees were reclassified as only those employees who worked a minimum of 40 hours per week; part-time employees were reclassified as those who worked zero to 25 hours per week. The number of full and part-time positions at any individual store was determined by that store's sales volume. The Longs where Saadati worked had been entitled to eight full-time employees. But under the new program, Saadati's store was allotted just six regular full-time positions. These six full-time positions were: File Maintenance Clerk, Bookkeeper, Cosmetics Clerk, Photo Manager, Photo Lab, and Stocking Lead. These positions were also the minimum number necessary to operate any individual store.

When Saadati advised Clark that she could not work 40 hours per week because of her knee injury, he offered to accommodate her by allowing her to work 25 hours per week, in other words, become a part-time employee. Saadati rejected this alternative and instead elected to work 40 hours per week so that she could retain the medical benefits which were available only to employees who worked 32 hours or more per week. Saadati became the only full-time Customer Service Representative at the Longs where she worked. But two months later, Longs eliminated the full-time Customer Service Representative position. Clark urged Saadati to take the part-time position because it “would give her [nonmedical] benefits longer. She would still be with the company. We wanted her to stay on. I didn’t want to lose her. And it would give [her time] to think. It could give time for maybe a full-time position to open up.” Rather than accept the part-time position with its concomitant reduction in medical benefits, Saadati elected to be laid-off.

In October 2005, Saadati filed a complaint against Longs for violations of the Fair Employment and Housing Act (FEHA; Gov. Code, § 12940 et seq.).<sup>2</sup> The causes of action included unlawful discrimination based upon physical disability, failure to accommodate, and retaliation.<sup>3</sup>

Prior to trial, Longs sought an order precluding Saadati from presenting any evidence of Saadati’s request to be transferred to other positions in the store, arguing that “requests for a transfer to other positions (for which she was not qualified) cannot form the basis of [Saadati’s] claims because, at the time [she] made these requests, she was *already* being accommodated and thus [Longs] had no duty to provide her *another* accommodation or the accommodation she *preferred*.” The trial court denied the motion.

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<sup>2</sup> All undesignated statutory references are to the Government Code.

<sup>3</sup> The complaint named Clark as a defendant, but Saadati dismissed him shortly before trial commenced. It also included a cause of action for failure to prevent harassment and discrimination, as to which Longs’s successfully obtained summary adjudication in September 2006, and one for wrongful termination in violation of public policy, which Saadati dismissed in April 2007.

Jury trial commenced on April 3, 2007. On April 12, 2007, the jury returned a special verdict in favor of Saadati on her disability discrimination claim and awarded her damages in the amount of \$100,000, comprised of \$35,200 in compensatory damages and \$64,800 in punitive damages; the jury found in favor of Longs and against Saadati on Saadati's remaining claims for failure to accommodate and retaliation. Judgment was filed on May 8, 2007, and Saadati served a Notice of Entry of Judgment on May 14, 2007.

Longs filed the following posttrial motions: (1) a motion for a new trial of Saadati's discrimination claim, only, on the grounds that the jury returned inconsistent special verdicts;<sup>4</sup> (2) a motion for new trial on the grounds that the verdict was not supported by substantial evidence; and (3) a motion for JNOV, on the grounds that there was no substantial evidence that Saadati was qualified for the other positions she sought within the company.<sup>5</sup>

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<sup>4</sup> Specifically, the jury inconsistently found:

- Saadati's knee injury was "a motivating reason for [Longs's] refusal to allow [Saadati] to transfer into a position she sought for which she could perform the essential functions with or without reasonable accommodation" (Special Verdict Question No. 4); and
- Saadati's "knee injuries and/or requests for reasonable accommodation(s) [were not] a motivating reason(s) for any adverse employment action taken against her by [Longs]."

<sup>5</sup> Longs also filed a motion for JNOV on the grounds that the punitive damage award was not supported by evidence that a corporate officer, director or managing agent was involved in the adverse employment decision. Longs's notice of appeal indicates that appeal is from the denial of this JNOV motion, but Longs's opening brief argues only that Saadati did not prove she was a qualified individual with a disability. Accordingly, we find that Longs has abandoned the punitive damages issue. (*Wright v. City of Los Angeles* (2001) 93 Cal.App.4th 683, 689 [in the absence of citation to authority and a coherent legal argument, asserted grounds for appeal are deemed abandoned and unworthy of discussion].)

On June 29, 2007, the trial court granted Long's motion for new trial on Saadati's discrimination claim because of the inconsistent verdicts, but denied the other motions. Long filed a timely notice of appeal on August 28, 2007.

## DISCUSSION

Long contends that judgment must be entered in its favor because there was insufficient evidence to support a finding that Saadati was a " 'qualified individual' with a disability." It argues that there was no legally sufficient evidence that Saadati "possessed the prerequisite skills, experience or knowledge necessary to perform any of the positions she sought with or without reasonable accommodation." In this regard, Long argues that Saadati's opinion of her own qualifications was of no evidentiary weight. Regarding the position of Cosmetics Clerk in particular, Long argues that Saadati "never expressed interest in, applied for, or sought" that position. We disagree.

"California has prohibited employment discrimination based on physical handicap since 1973. [Citation.] 'In 1980, that prohibition and the definition of physical handicap . . . were incorporated into the newly enacted FEHA.' [Citation.]" (*Green v. State* (2007) 42 Cal.4th 254, 262 (*Green*).) The FEHA makes it unlawful for an employer to bar or discharge a person from employment, or discriminate against the person in compensation or in terms, conditions or privileges of employment, because of physical disability. (§ 12940, subd. (a).) To make a prima facie case of disability discrimination under the FEHA, a plaintiff must establish that (1) she was a member of a protected class; (2) she was qualified or was performing competently in the position she held; (3) she suffered an adverse employment action; and (4) some other circumstance suggests a discriminatory motive. (*Guz v. Bechtel* (2000) 24 Cal.4th 317, 355; see also *Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1246.)

The proscription against disability discrimination in section 12940 excludes from coverage "those persons who are not qualified, even with reasonable accommodation, to perform essential job duties: 'This part does not prohibit an employer from refusing to hire or discharging an employee with a physical . . . disability . . . where the employee,

because of his or her physical . . . disability, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger his or her health or safety or the health or safety of others even with reasonable accommodations.’ (§ 12940, subd. (a)(1).)” (*Green, supra*, 42 Cal.4th at p. 262.)

“[W]hen an employee seeks accommodation by being reassigned to a vacant position in the company, the employee satisfies the ‘qualified individual with a disability’ requirement by showing he or she can perform the essential functions of the *vacant position* with or without accommodation. [Citations.] The position must exist and be vacant, and the employer need not promote the disabled employee. [Citations.]” (*Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 978; see also *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 256 [“the plaintiff proves he or she is a qualified individual by establishing that he or she can perform the essential functions of the position to which reassignment is sought, rather than the essential functions of the existing position”].)

It is the plaintiff’s burden to prove that she was able to do the job with or without reasonable accommodation. (*Green, supra*, 42 Cal.4th at pp. 123, 126.) An employee’s subjective personal judgments of his or her competence alone are not sufficient. (See *Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 816 [upon defense motion for summary judgment in age discrimination action, plaintiff’s “personal judgments of his or her competence alone do not raise genuine issue of material fact”].)

Here, the evidence establishes that Longs denied Saadati’s requests to be reassigned to a full-time position at the Longs where she worked, or at another Longs in the area. The following were full-time positions at Longs: Cosmetics Clerk, File Maintenance Clerk, Bookkeeper, Photo Lab Clerk, Pharmacy Clerk or Stocking Clerk. If there was substantial evidence that Saadati could perform the essential functions of any *one* of these positions, it would be sufficient to support the jury’s verdict. Apart from whether there was evidence that Saadati could perform the essential functions of any of

the other full-time positions she sought, there was substantial evidence that she could perform the essential functions of a Cosmetics Clerk.

At trial, Clark testified that, after the Customer First Staffing Initiative was implemented, Saadati asked about the availability of any full-time positions at the Longs at which she was working, as well as other Longs in the district. Clark testified that Cosmetics Clerk was one of three or four full-time Stocking Clerk positions in the Longs where Saadati worked. He explained that the Stocking Clerk position is coded “97” and that a Cosmetics Clerk is “a code 97, which is a stocking clerk.” When asked whether all Cosmetics Clerks are coded 97, Clark responded: “Pretty much, yeah. If they stock, then it’s a 97.” Before Saadati was laid off, Clark and someone from Human Resources made efforts to determine whether there were any Stocking Clerk positions in other Longs stores in the area, but there were not. From this evidence, the jury could reasonably infer that Saadati sought a position as Cosmetics Clerk.

In its opening brief, Longs concedes that Clark “possessed the personal knowledge and foundation to testify regarding the requirements of the positions [Saadati sought].” Clark described the responsibilities of a Cosmetics Clerk as follows: “Order. Put away -- supplies the shelves, break down the load. Customer service. Cashier. Dust, clean.”

Clark also testified that Saadati was a good employee with whom he had a good rapport. Clark elaborated that Saadati was a “great employee. She had a lot of experience. She knew a few departments. *She knew cosmetics.* You know, she could help out. [¶] . . . [Saadati] did anything I asked her. You know. And she could do it well. She had a lot of experience. She had been at the store since it opened. She knew a lot of customers. I wanted [Saadati] to stay. That wasn’t my call, eliminating [the full-time Customer Service Representative position].” (Italics added.)

This evidence constitutes substantial evidence from which a reasonable trier of fact could infer that Saadati could perform the essential functions of a Cosmetics Clerk. Accordingly, Saadati satisfied her burden of proof, the judgment is supported by substantial evidence, and the trial court did not err in denying Longs’s JNOV motion.



## **DISPOSITION**

The judgment is affirmed. Saadati shall recover her costs on appeal.

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RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

BAUER, J.\*

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\* Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.